Supreme Court, U.S.
FILED
SEP 2 1998
OFFICE OF THE CLERK

No. 98-2

IN THE

Supreme Court of the United States

October Term, 1998

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

RICHARD SABO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

PATRICE SMILEY ANDREWS
METROPOLITAN LIFE
INSURANCE COMPANY
One Madison Avenue
New York, New York 10010
Of Counsel

SHEILA L. BIRNBAUM*
IRENE A. SULLIVAN
DOUGLAS W. DUNHAM
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000
**Counsel of Record*

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE CONFLICT AMONG THE COURTS OF APPEALS WARRANTS A GRANT OF CERTIORARI IN THIS CASE 1

II. ALLOWING RICO CLAIMS CONTRAVENES THE PURPOSE AND PLAIN MEANING OF THE McCARRAN-FERGUSON ACT 5

III. RICO'S EXTRAORDINARY, MANDATORY REMEDIES WOULD IMPAIR PENNSYLVANIA INSURANCE LAW 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES PAGE(S)

Ambrose v. Blue Cross & Blue Shield, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996), *aff'g*, 891 F. Supp. 1153 (E.D. Va. 1995) 2, 7

Barnett Bank v. Nelson, 517 U.S. 25 (1996) 6

Black v. Nationwide Mutual Insurance Co., 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978) 6

Doe v. Norwest Bank, 107 F.3d 1297 (8th Cir. 1997) 2

Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998) ... 2, 3

Humana Inc. v. Forsyth, 118 S. Ct. 2339 (1998) 1, 9

Kenty v. Bank One, 92 F.3d 384 (6th Cir. 1996) 2

Martin v. Johns-Manville Corp., 494 A.2d 1088 (Pa. 1985) 7

Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995) 2

United States Department of Treasury v. Fabe, 508 U.S. 491 (1993) 5

United States v. Blumeyer, 114 F.3d 758, 768 (8th Cir.), *cert. denied*, 118 S. Ct. 350 (1997) 8

Wexco Inc. v. IMC, Inc., 820 F. Supp. 194 (M.D. Pa. 1993) 8

STATUTES PAGE(S)

15 U.S.C. § 1011 5

15 U.S.C. §1012(b) 2

29 U.S.C. §§ 1001-1461 4

40 Pa. S. §§ 71-72 8

40 Pa. S. § 1171 8

40 Pa. S. § 1171.2 6

OTHER AUTHORITIES PAGE(S)

Farrokh Jhabvala, *The "Direct Conflict" Test for First Clause McCarran-Ferguson Cases*, 33 Tort & Ins. L. J. 1147 (1998) 3, 4

Petitioner Metropolitan Life Insurance Company ("MetLife") respectfully submits this reply brief in further support of its petition for certiorari. Contrary to plaintiff's contentions, this case presents substantially the same question with respect to which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 118 S. Ct. 2339 (1998) (No. 97-303): whether the availability of a civil RICO claim to challenge allegedly deceptive practices in the business of insurance would, in contravention of the McCarran-Ferguson Act, "invalidate, impair or supersede" state regulatory systems that govern the same alleged conduct and provide different -- and discretionary as opposed to mandatory -- remedies. As the Third Circuit recognized in its decision in this case, this issue, which affects insurance litigation nationwide, is the subject of conflicting decisions in the Courts of Appeals. MetLife respectfully submits that, in view of the importance of this issue, certiorari should be granted in this case as well as in *Humana* and that this Court should hear oral argument in the two cases on the same day.

ARGUMENT

I. THE CONFLICT AMONG THE COURTS OF APPEALS WARRANTS A GRANT OF CERTIORARI IN THIS CASE

In its opinion in this case, the Third Circuit acknowledged that "Courts of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair or supersede under the [McCarran-Ferguson] Act" and that, in particular, the issue of whether the McCarran-Ferguson Act precludes RICO claims based on insurance trade practices "divides sister Courts of Appeals." (App. 17a, 30a) Nevertheless, in his opposition to certiorari, plaintiff incorrectly asserts that there is no conflict between the Third Circuit's decision in this case that the McCarran-Ferguson Act permits RICO claims based on allegations of unfair insurance trade practices and the decisions of other circuits that have barred RICO claims under

McCarran-Ferguson. Plaintiff's assertion is contradicted by the Third Circuit itself, which expressly recognized that its decision was contrary to the decisions of the Eighth, Sixth and Fourth Circuits. *See Doe v. Norwest Bank*, 107 F.3d 1297 (8th Cir. 1997) (barring RICO claims); *Kenty v. Bank One*, 92 F.3d 384 (6th Cir. 1996) (same); *Ambrose v. Blue Cross & Blue Shield*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996) (same), *aff'g*, 891 F. Supp. 1153 (E.D. Va. 1995).[1]

Plaintiff appears to argue that there is no conflict between these decisions because they address the effect of RICO on the insurance laws of different states. In fact, the different decisions reached by the Courts of Appeals are not based on variations in state law.[2] Rather, these different outcomes result from the conflicting interpretations by the Courts of Appeals of the McCarran-Ferguson Act's statutory language "invalidate, impair, or supersede." *See* 15 U.S.C. §1012(b).

---

[1] *But see Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995) (permitting RICO claims); *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) (same), *cert. granted*, 118 S. Ct. 2339 (U.S. 1998).

[2] Indeed, the Solicitor General noted in urging this Court to grant certiorari in *Humana* that the "divergent results cannot be entirely explained by reference to differences in the pertinent state insurance laws." *See* Brief of United States as *Amicus Curiae* at 8, *Humana Inc. v. Forsyth*, No. 97-303 (May 29, 1998) ("Amicus Br."). Rather, as the Solicitor General stated, "the divergent results appear to be the product of differing -- indeed, irreconcilable -- interpretations of the McCarran-Ferguson Act and the terms 'invalidate, impair, or supersede' in particular." *Id.* at 9.

The Third Circuit in this case and the Ninth Circuit in *Forsyth v. Humana Inc.*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998), require a direct conflict between substantive provisions of state and federal law as a precondition to finding that a federal law invalidates, impairs or supersedes state insurance law and so have rejected the proposition that RICO's extraordinary mandatory remedies impair state insurance law.[3] In contrast, the Eighth, Sixth and Fourth Circuits have ruled that the disparity in remedies between RICO and state statutory or common law -- a disparity that has apparently existed in every case decided thus far on the application of RICO under the McCarran-Ferguson Act -- seriously and substantially impairs state law.[4] In short, the Courts of Appeals are in stark disagreement on this question, and that disagreement merits resolution by this Court.

Moreover, contrary to plaintiff's contentions, the question presented by the instant case is substantially the same question that is presented in *Humana Inc. v. Forsyth*, in which this Court recently granted certiorari, *i.e.*, whether the McCarran-Ferguson Act's prohibition of the invalidation, impairment, or supersedence of state insurance law precludes RICO claims where RICO's extraordinary mandatory remedies are not available under applicable state law. Plaintiff attempts

---

[3] Contrary to plaintiff's assertion, the Third Circuit in this case clearly applied a conflict analysis in finding that the McCarran-Ferguson Act did not preclude RICO claims. *See, e.g.*, App. 34a ("We too cannot see the *conflict* in this case and find no invalidation, impairment, or supersedence" of Pennsylvania insurance law) (emphasis added); *see also* Farrokh Jhabvala, *The "Direct Conflict" Test for First Clause McCarran-Ferguson Cases*, 33 Tort & Ins. L. J. 1147, 1160-61 (1998) (Third Circuit in *Sabo* "substituted a test of incompatibility or direct conflict for a test of impairment").

[4] *See* cases cited in MetLife's Petition ("Pet.") at 12 n.8.

to differentiate this case from *Humana* by claiming that Nevada law gives sole authority over the regulation of insurance trade practices to the insurance commissioner of that state, while Pennsylvania law (at issue here) permits private rights of action under the common law and under Pennsylvania's Consumer Protection law. *See* Respondent's Brief in Opposition ("Resp. Br.") at 9. However, as the Solicitor General has pointed out, Nevada, like Pennsylvania, in fact allows common-law actions for fraud based on insurance trade practices. *See* Amicus Br. at 9 n.4. Moreover, neither state provides for mandatory treble damages and attorneys' fees in actions based upon allegedly deceptive insurance trade practices.

Contrary to plaintiff's contentions, MetLife does not urge that certiorari should be granted in the present case simply because certiorari was granted in *Humana*. Rather, the different factual and legal backgrounds of the two cases constitute a compelling reason for granting certiorari in this case in addition to *Humana*. The two cases address the effect of RICO on different state insurance laws and regulatory frameworks, as well as two different areas of insurance law -- life insurance sales practices and health insurance co-payments pursuant to an employee benefit plan governed by ERISA, 29 U.S.C. §§ 1001-1461.

Moreover, although this Court has in the past resolved certain issues raised by section 1012(b) of the McCarran-Ferguson Act, the Court has never had occasion to address the scope and intent of the statutory language "invalidate, impair or supersede." *See* Farrokh Jhabvala, *supra*, 33 Tort & Ins. L. J. at 1151-52 (1998) (criticizing direct conflict test). Hearing these two cases on the same day, as requested by MetLife, would give this Court a broader context in which to evaluate and define the statutory terms. As plaintiff acknowledges, the lower courts will face the issue as to whether RICO invalidates, impairs or supersedes state insurance regulatory systems in

various contexts and with respect to the laws of various states. *See* Resp. Br. at 12-13. Consideration by this Court of both *Humana* and the present case should provide the lower courts with more complete guidance. In sum, the differences between this case and *Humana* support this Court's granting certiorari in this case and hearing the two cases on the same day.

II. ALLOWING RICO CLAIMS CONTRAVENES THE PURPOSE AND PLAIN MEANING OF THE McCARRAN-FERGUSON ACT

In his opposition, plaintiff turns upside down the statutory purposes of the McCarran-Ferguson Act and Pennsylvania's Unfair Insurance Practices Act ("UIPA"). Plaintiff incorrectly argues that the McCarran-Ferguson Act was somehow intended to *limit* state powers and that in enacting the UIPA Pennsylvania "recognized the [McCarran-Ferguson Act's] limitation upon state powers to regulate the business of insurance" and "acknowledged" that "both federal and state law could collectively 'regulate the business of insurance.'" *See* Resp. Br. at 17. Plaintiff's view of the purposes and effect of these statutes is completely unsupported.

Contrary to plaintiff's contentions, Congress enacted the McCarran-Ferguson Act "to restore the supremacy of the States in the realm of insurance regulation." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). Indeed, the McCarran-Ferguson Act's Declaration of Policy states "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. Moreover, contrary to plaintiff's contentions, Pennsylvania enacted the UIPA, not in recognition of any limitation on its power to regulate insurance, but to "*occupy the field* of regulating the business of insurance

as contemplated by [the McCarran-Ferguson Act]." *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977) (emphasis added), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *see also* 40 Pa. S. § 1171.2 (UIPA was intended to "regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the [McCarran-Ferguson] act").

Indeed, Congress in enacting the McCarran-Ferguson Act was concerned in particular with the effect of laws of general application such as RICO. Congress enacted the McCarran-Ferguson Act to protect state regulation of insurance from "inadvertent federal intrusion" through the application under the Commerce Clause of federal statutes that (like RICO) "describe[] an affected activity in broad, general terms, of which the insurance business happens to comprise one part." *Barnett Bank v. Nelson*, 517 U.S. 25, 39 (1996).

Plaintiff does not address the legislative history of the McCarran-Ferguson Act, which clearly shows that the protection provided to state insurance regulation encompassed more than merely barring the application of federal laws that *directly conflict* with state insurance law. *See* MetLife's Pet. at 14-15. The Third Circuit (like the Ninth Circuit before it) erroneously equated the McCarran-Ferguson Act's statutory language "invalidate, impair or supersede" with "conflict." (App. 34a). As shown in Point III of MetLife's Petition, the direct conflict test, which incorrectly imports the principles of federal preemption under the Supremacy Clause into the McCarran-Ferguson analysis, impermissibly creates a presumption in favor of the application of federal law to insurance matters. Thus, the anomalous result of the Third Circuit's decision is that principles of law that were designed to limit federal preemption of state law are employed to authorize federal intrusion into state regulation of the business of insurance.

This result is flatly contrary to the language and intent of the McCarran-Ferguson Act.

III. RICO'S EXTRAORDINARY, MANDATORY REMEDIES WOULD IMPAIR PENNSYLVANIA INSURANCE LAW

Plaintiff attempts to gloss over the fact that RICO's remedial provisions impose extraordinary mandatory penalties that have no counterpart under Pennsylvania statutory and common law. Rather, the causes of action available under Pennsylvania law provide discretionary as opposed to mandatory remedies.[5] In contrast to RICO's mandatory treble damages and attorneys' fees, under Pennsylvania law punitive damages are discretionary, subject to strict judicial controls, and available only in exceptional circumstances. S*ee Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985). Plaintiff entirely fails to acknowledge the interest that Pennsylvania (as well as other states) has in subjecting the reasonableness of extra-contractual punitive damages awards to the scrutiny and review of the courts.

Allowing plaintiffs to recover mandatory treble damages and attorneys' fees pursuant to RICO would circumvent and undermine Pennsylvania's comprehensive statutory and regulatory enforcement framework. As the Fourth Circuit made clear in *Ambrose*, "because of the dramatic disparity in the cause of action and remedies available to RICO plaintiffs, RICO would effectively supplant" state insurance law.

---

[5] Plaintiff incorrectly asserts that the distinction drawn by MetLife between RICO's mandatory remedies and Pennsylvania's discretionary remedies is "unsubstantiated." *See* Resp. Br. at 8. On the contrary, the distinction is substantiated by well settled Pennsylvania statutory and decisional law that is cited and discussed in Point IV of MetLife's Pet.

Ambrose, 1996 U.S. App. LEXIS 22035, at *4; *see also United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir.) (RICO claims, with their severe, mandatory remedies, could wreak "potential havoc" on a state's "carefully considered mechanism for regulating insurance companies") (discussing *Doe*), *cert. denied*, 118 S. Ct. 350 (1997); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993) (RICO claims would "upset the balance of relationships between insurance entities and insureds which are established and regulated" by Pennsylvania law).

Furthermore, in order to protect its citizens who are policyholders, Pennsylvania, like all or virtually all of the other states, regulates extensively to ensure that insurance companies located or doing business in the state are financially sound. *See* MetLife's Pet. at 26-27. Permitting civil RICO claims with their mandatory treble damages and attorneys' fees in the insurance context could endanger the financial stability of insurers and frustrate state regulation aimed at preserving that financial stability.

In short, the Third Circuit's decision ignores the serious impairment that allowing RICO claims would cause to Pennsylvania's UIPA, 40 Pa. S. § 1171 *et seq.*, and Pennsylvania's other insurance regulatory statutes, *e.g.*, 40 Pa. S. §§ 71-72. Permitting RICO claims would nullify the balancing of competing policy interests that was made by the Pennsylvania legislature in establishing the Pennsylvania regulatory system. The Pennsylvania legislature gave effect to its policy choices by setting appropriate penalties, providing certain statutory remedies to aggrieved policyholders and upholding Pennsylvania common law remedies. The Third Circuit's decision, permitting RICO's severe, mandatory remedies in the insurance context, would impair and disrupt the Pennsylvania statutory and regulatory system and should be reversed by this Court.

CONCLUSION

This Court should grant certiorari to resolve the conflict among the Courts of Appeals regarding the applicability of RICO under the McCarran-Ferguson Act and should schedule oral argument in this case on the same day as *Humana Inc. v. Forsyth*, 118 S. Ct. 2339 (1998) (No. 97-303).

Respectfully submitted

Sheila L. Birnbaum*
Irene A. Sullivan
Douglas W. Dunham
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000
**Counsel of Record*

Patrice Smiley Andrews
METROPOLITAN LIFE
INSURANCE COMPANY
One Madison Avenue
New York, New York 10010
Of Counsel